

**SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

LUX HOMES, LLC,

Petitioner,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

SAVE LAKE SAMMAMISH,

Intervenor

SHB NO. 04-025

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

Petitioner Lux Homes LLC (“Lux Homes”) contests the denial of Shoreline Variance Permit #2004-NW-80049 (City of Sammamish Variance Permit #PLN2004-00010) by the Department of Ecology (“Ecology”) on December 10, 2004. Save Lake Sammamish (“SLS”) intervened in opposition to the variance permit. A hearing on the matter was held in Issaquah on May 2, 2005, and in Lacey on May 3 and 4, 2005.

The Shorelines Hearings Board (“Board”) was comprised of David W. Danner (Presiding), William H. Lynch, Bill Clarke, David W. Danner, Mary-Alyce Burleigh, Judy Wilson, and Peter Philley. Kim Otis and Randi Hamilton of Gene Barker and Associates of Olympia, Washington, provided court-reporting services. Eric R. Hultman represented Petitioner

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1 Lux Homes. Assistant Attorney General Colleen G. Warren represented Ecology. J. Richard  
2 Aramburu represented Intervenor SLS.

3 On the first morning of hearing, the Board conducted a site visit with all parties present.  
4 The Board also received sworn testimony of witnesses, exhibits, and argument on behalf of the  
5 parties. Having fully considered this record, the Board enters the following:

6 **Findings of Fact**

7 [1]

8 The East shore of Lake Sammamish has been subject to significant levels of residential  
9 development in recent years. Many of the homes are built relatively close to the shoreline, and  
10 are large homes in relation to the size of the lots. Along East Lake Sammamish Parkway and the  
11 East Lake Sammamish Trail, views of the lake are impacted by the nature and extent of  
12 residential development. (Testimony of Buehler; Frodge)

13 [2]

14 Mr. Steven Tyler owns a lot on the southeast shore of Lake Sammamish in the City of  
15 Sammamish.<sup>1</sup> The lot is approximately 35 feet wide and 40.3 feet deep, or about 1411 square  
16 feet, and is undeveloped. The two lots to the west of the property are undeveloped. The lot  
17 immediately adjacent to the west measures approximately 100 feet wide by 55 feet deep. The lot  
18 further west is approximately 50 feet wide by 50 feet deep. Both of these lots are used for  
19 recreational purposes. The lot immediately adjacent to the east is also undeveloped and used for

1 recreational purposes; it measures approximately 25 feet wide by 38 feet deep. (Ex. P-9)  
2 Properties further east and west in the immediate area contain full-time single-family residences.  
3 Many other lots along the east side of Lake Sammamish are still undeveloped and used for  
4 recreational purposes. (Testimony of Schisel, Buehler) Mr. Tyler's lot is located within an area  
5 designated as "rural environment" under the King County Code. (Ex. P-2)

6 [3]

7 On October 25, 2000, Mr. Tyler entered into a purchase and sale agreement with  
8 Petitioner Lux Homes, a commercial home building company, giving Lux Homes an option to  
9 purchase the parcel for \$175,000. The offer was conditional upon receipt of a building permit.  
10 The agreement was renewed on December 15, 2002. (Ex. R-10)

11 [4]

12 On June 19, 2003, John Lux, the principal of Lux Homes, filed an application for a  
13 variance to construct a house on the property within 14 feet of the ordinary high water mark  
14 ("OHWM"), as opposed to the 20 feet required in the King County Code.<sup>2</sup> He proposed to  
15 construct "a 1900sf single-family residence, 3 stories with 2-car garage on vacant lot." (Ex. P-1)  
16 In preparing his application, Mr. Lux hired David Evans & Associates, a consulting firm, to  
17 make an OHWM determination. Scott Swarts conducted the OHWM study for Evans &  
18 Associates, and found the OHWM to be approximately 26 feet. (Testimony of Swarts)

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19 <sup>1</sup> Mr. Lux stated on the application, "I am the owner of the property identified and approve of this application." (Ex.  
20 P-1) In later correspondence with the City, Mr. Lux stated that Lux Homes LLC was the owner of the property.  
(Ex. P-10) However, Mr. Lux testified at hearing, and the Board finds, that Mr. Tyler owns the property.

21 <sup>2</sup> Although Lux Homes LLC is the entity petitioning before this Board, John Lux filed the variance application with  
the City.

1 [5]

2 Evan Maxim, Associate Planner with the City of Sammamish Department of Community  
3 Development, reviewed the application for the City. At some point during his review, Maxim  
4 was informed of a current violation on the site regarding the placement of fill waterward of the  
5 OHWM. He requested information from Mr. Lux, who responded on October 3, 2005, that he  
6 had allowed another homebuilder to use the lot for storage and parking, but did not allow the  
7 placement of rock on the beach area. (Testimony of Lux; Ex. P-10) However, because the  
8 existence of fill may have affected the OHWM delineation, Mr. Maxim also requested that B-  
9 twelve Associates, Inc., of Kent, Washington, review the OHWM designation contained on the  
10 site plan. By letter dated December 8, 2003, Ed Sewall of B-twelve stated that based on his visit  
11 to the site, the edge of standing water was landward of the Evans-delineated OHWM “by 1-6  
12 feet.” An attached site map indicated the OHWM to be approximately 27 feet. (Ex. R-9)

13 [6]

14 On June 9, 2004, Mr. Lux received from the City of Sammamish a variance to reduce to  
15 zero the 10-foot street setback adjoining the north property line (abutting the former railroad  
16 right of way). (Testimony of Lux)

17 [7]

18 Mr. Maxim prepared a “Staff Report Recommendation to the Hearing Examiner,” dated  
19 July 21, 2004. The report reviewed the variance request for each of the criteria set forth in the  
20 applicable regulation, WAC 127-17-200, and found that each was met. It found that the strict  
21 application of the City’s master program would create a hardship to the owner by making

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1 unfeasible the construction of a single-family residence on the property. It found that nearby  
2 properties had single-family residences, and that therefore allowing the variance would not  
3 constitute a grant of special privilege. It further found that according to the site plan submitted to  
4 the City by Lux Homes, the proposed development would cover only 38 percent of the lot with  
5 impermeable surfaces, less than the 55 percent allowed by the City Code. For this reason, it  
6 found, the proposal met the criterion that the variance requested be the minimum necessary to  
7 afford relief. The report recommended approval of the variance application, subject to several  
8 conditions, including that prior to the issuance of a building permit, the applicant shall prepare a  
9 “shoreline enhancement / restoration plan” for the property, addressing the removal of debris  
10 placed at the site. It recommended that the plan be reviewed and approved by the City, and that  
11 a financial surety for the restoration be posted prior to the issuance of a building permit. It also  
12 recommended that the applicant provide a “planting plan” with a monitoring program and  
13 financial surety. With these conditions, the report concluded, the proposal would have no  
14 substantial environmental impacts and would be in the public interest. (Ex. P-2)

15 [8]

16 On August 4, 2005, City of Sammamish Hearing Examiner Gordon F. Crandall convened  
17 a hearing on the variance application. The staff report was offered and admitted into evidence,  
18 and the testimony of Mr. Maxim and Mr. Lux was taken. On August 23, 2005, Examiner  
19  
20  
21

1 Crandall issued a decision concurring with the staff report and approving the variance subject to  
2 the conditions recommended by staff. (Ex. P-3)<sup>3</sup>

3 [9]

4 The City subsequently submitted the variance application and decision to Ecology for  
5 review pursuant to WAC 173-27-180. Alice Schisel, then a Shoreline Planner with the  
6 Department of Ecology, was assigned the matter. In the course of her review, she looked at the  
7 City staff report, the King County SMP, and the criteria in WAC 173.23.170. She directed two  
8 Ecology staffers, Senior Wetlands Specialist Erik Stockdale and Wetlands Specialist Richard  
9 Robohm, to visit the site to determine independently the OHWM. She said this was done  
10 because of the conflicting earlier OHWM's, the lack of data discussing how they were arrived at,  
11 and the presence of information regarding disturbances on the site, i.e., the unauthorized gravel  
12 placed on the site. (Testimony of Schisel)

13 [10]

14 Stockdale and Robohm visited the site with Schisel on October 28, 2004. To calculate  
15 the OHWM, they first checked a gauge in the water at nearby Lake Sammamish State Park  
16 indicating the lake's elevation between 26.75. Aware that a recent study by the City of Bellevue  
17 noted that the gauge was off by 0.3 to 0.4 feet, they subtracted this from the gauge measurement  
18 and arrived at a lake elevation of 26.35 to 26.45 feet. (Ex. R-18) They then went to the Tyler  
19 property, where they found that "based on readily apparent vegetative, hydrologic and soil

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21 <sup>3</sup> At the time of hearing, Mr. Lux had not filed for a hydraulic approval permit or a shoreline substantial  
development permit. (Testimony of Lux)

1 indicators,” the OHWM was higher than that identified by B-twelve. They placed five flags on  
2 the property where they found the OHWM to be indicated. They then measured this newly-  
3 determined OHWM from the southern edge of the road to the north of the lot, which they  
4 determined to be five feet north of the property line. They recorded the approximate locations of  
5 the five flags onto the site plan, and determined the OHWM was within a range of 28.28 and  
6 27.76 feet, though they cautioned that Lux Homes “will need to survey the flags we placed on  
7 the property to get an accurate site plan based on the revised OHWM line.” Stockdale  
8 summarized their work in a September 19, 2004, memo to Alice Schisel. Robohm read the  
9 report and agreed with its conclusions. (Testimony of Stockdale, Robohm, Summerhays; Ex. R-  
10 3)

11 [11]

12 Ms. Schisel prepared a recommendation and forwarded it to Jeannie Summerhays,  
13 Section Manager of Ecology’s Shorelines and Environmental Assistance Program. In here  
14 memo she reiterated her conclusion that with the new OHWM determination, the lot size  
15 landward of the OHWM was 1411 square feet. (Ex. R-9) Ms. Summerhays met with Ms.  
16 Schisel, Mr. Stockdale, and Mr. Robohm; reviewed and accepted the recommendations in the  
17 memo, and on December 10, 2004, issued a letter denying the variance. In the letter, she stated  
18 that Ecology had determined the project to be inconsistent with the King County shoreline  
19 master program and the several of the variance criteria contained in WAC 173-27-170. (Ex. R-1;  
20 Testimony of Summerhays, Schisel)

1 [12]

2 Specifically, Ecology found that Lux failed to meet WAC 173-27-170(2)(c) – i.e., that  
3 the design of the project is compatible with other authorized uses within the area and with uses  
4 planned for the area under the comprehensive plan and shoreline master program and will not  
5 cause adverse impacts to the shoreline environment. It noted, among other things, that “[i]t is  
6 reasonable to anticipate that the scale of the development on such a small lot will cause adverse  
7 impacts to the environment” because, given the need to establish a shoreline access path and to  
8 accommodate activities common to shoreline residences (such as boating, swimming, and  
9 picnicking), the narrow setback area would not provide an effective buffer between the  
10 development and near-shore habitat. (Ex. R-1)

11 [13]

12 Ecology found that the project also fails to meet WAC 173-27-170(2)(d) – i.e., that the  
13 variance will not constitute a grant of special privilege not enjoyed by the other properties in the  
14 area. It found that the lots immediately adjacent to the Tyler property were undeveloped and  
15 used for recreational purposes, and concluded, “If future use of these lots is limited to  
16 recreational activities, approval of this variance would constitute a grant of special privilege.”  
17 Because the lot can be used for recreational purposes without a shoreline variance, Ecology  
18 concluded that the “variance requested is not the minimum necessary to afford relief,” and  
19 therefore the proposed project fails to meet the criterion in WAC 173-27-170(e). (Ex. R-1)



1 [14]

2 Ecology further determined that the proposed project failed to meet the criterion in WAC  
3 173-27-170(f), that the public interest will suffer no substantial detrimental effect. It noted that  
4 while there are many non-conforming lots along the lake developed with single-family  
5 residences, the “exceedingly small size” of the lot makes development more problematic:

6 There will be little if any vegetated area to help prevent impacts to shoreline resources  
7 once access to the shoreline and the usual human activities on shoreline property are  
8 accommodated. Of particular concern are potential impacts to fish and nearshore habitat  
9 (removal and/or alteration of the presently limited vegetative shoreline buffer), water  
10 quality (reduced retention of precipitation through increased impervious surfaces,  
11 chemical inputs through practices common to lawn and garden maintenance, interruption  
12 of groundwater flows from foundation and/or retaining wall locations), greater  
13 dependence on shoreline armoring and aesthetic/view considerations.

14 (Ex. R-1)

15 [15]

16 Ecology next found that Lux had failed to meet WAC 173-27-170(a), which required Lux  
17 Homes to show that the strict application of the bulk, dimensional or performance standards set  
18 forth in the applicable master program precludes, or significantly interferes with, reasonable use  
19 of the property. Ecology stated:

20 The lot will be unable to accommodate the proposed development without the variance.  
21 However, the inability to build a [single family residence] does not preclude reasonable  
use of the property. The lot can be used for recreational purposes without a shoreline  
variance.

22 [16]

23 Ecology found as a final matter that the proposed development did not meet the standard  
24 set forth in WAC 173-27-170(4), which considers the cumulative impacts to the shoreline

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1 environment of additional requests for similar variances. Ecology said that the Tyler property  
2 was one of four remaining undeveloped lots in the site vicinity. Developing all four lots,  
3 Ecology said – all of which are small and non-conforming – would have a “resultant decrease in  
4 vegetation and increases in both impervious surfaces and human activity along the shoreline,”  
5 and “increase the potential for substantial adverse impacts to nearshore habitat and water  
6 quality.” (Ex. R-1)

7 [17]

8 Lux Homes filed its petition with the Board on December 30, 2004. On March 4, 2005,  
9 SLS filed a motion to intervene with the Board. After briefing by both SLS and Petitioner, the  
10 Presiding Officer granted SLS’ motion on March 24, 2005. (Order Granting Intervention, March  
11 4, 2005).

12 [18]

13 The Board finds that the OWHM on the property was between 28.28 and 27.76 feet, as  
14 determined by Ecology. It finds that the earlier determinations lacked discussion of  
15 methodology, factual data, photographs, or site information, and that Ecology supplied  
16 compelling evidence that the earlier OHWM designations were waterward of the correct  
17 OHWM. This included photographs of the site (Ex. R-3, R-4), a comprehensive discussion of its  
18 methodology and the factors considered in its determination (Ex. R-3), and a United States  
19 Geological Survey chart showing daily mean elevations for Lake Sammamish higher than those  
20  
21

1 in the earlier determinations. (Ex. R-3, p. 9)<sup>4</sup> Petitioner has not met its burden of showing that  
2 Ecology's OHMW determination was in error. With this OHWM, we find that the correct lot  
3 size to be 35 feet wide and an average of 40.3 feet deep, or approximately 1411 square feet, not  
4 1805 square feet as noted by Lux in its variance application and in the Hearing Examiner's  
5 findings of fact. The amount of impervious surface resulting from the project would be about 50  
6 percent, not the 38 percent found by the City. We also note that the project as proposed would  
7 require a setback of 13, not 14, feet.

8 [19]

9 The shoreline area of the property is largely in its natural condition. Fill was placed on  
10 the upland portion of the site under the current parking area. The lot shares with a neighboring  
11 lot a large cottonwood tree approximately 100 feet tall, which is used as perching habitat by  
12 herons, eagles, and other birds. (Testimony of Swarts) The natural shoreline, with stable tree  
13 roots from the large cottonwood and woody debris, is beneficial to spawning sockeye and out-  
14 migrating Chinook salmon. (Testimony of Frodge) Mr. Lux testified that if construction were to  
15 proceed, he would remove the cottonwood, although he had not yet discussed this matter with  
16 the owner of the property to the north on whose land the tree is partially located. (Testimony of  
17 Lux)

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20 <sup>4</sup> We also agree with Ecology that a survey is not required as part of an OHWM determination, and that it is up to  
21 the property owner and not the state to incur the cost of a survey to ensure that any construction is within the  
prescribed setback or authorized variance therefrom.

1 [20]

2 Shortly before this case went to hearing, Lux asked Don McQuilliams, a certified arborist  
3 and owner of Northwest Woodlands Urban Forestry Consultants, Inc., to prepare a site  
4 evaluation for the property. (Testimony of Lux, Swarts) The purpose of the study was “to  
5 conduct a brief visual assessment of existing tree conditions as they relate to current tree health  
6 and future safety concerns should a new residence be constructed as proposed.” In his study,  
7 McQuilliams identified seven trees on the lot, dominated by the 100-foot cottonwood. He  
8 observed that the root system of this cottonwood would be severely impacted by excavation and  
9 construction of the new residence. Even with extreme care, he said, the construction would  
10 likely send the tree into a state of shock and possible decline. If it survives, he continued, it  
11 would present a safety hazard to the new structure. He recommended that the tree be removed if  
12 construction moves forward and the area restored with native species “more suitable to an  
13 adjacent residence.” Moreover, he said, because the roots of three other cottonwoods are likely  
14 intertwined with the larger tree, he recommended that if the larger tree is removed, the three  
15 smaller cottonwoods also be removed.

16 In addition, he identified three Oregon Ash on the property. One, which stands about 40  
17 feet tall, would be “heavily impacted by the construction of the new residence,” including both  
18 “a future hazard risk” and “the potential of complete failure.” The other two, he found, are  
19 showing signs of decline due to yearly flooding of the root system. If this pattern continues, he  
20 said, the trees “may limp along for a while but will most likely begin to die off as they mature  
21 and the root systems can no longer support the trees['] demands.” He recommended that if a

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1 residence is to be built, the trees should be removed and replaced “with a more suitable native  
2 species.” Mr. McQuilliams submitted a restoration plan for the property that he said was  
3 “suitable to the proposed residence.” The plan included a variety of native and non-invasive  
4 plants, as well as a lawn and gravel path. (Ex. P-19)

5 [21]

6 Ecology and SLS witnesses testified that they reviewed the arborist’s report and found it  
7 insufficient. Issaquah Creek is a major producer of salmon, they said, and the sockeye and  
8 Chinook salmon outmigrating prefer shallow water associated with large trees and good cover.  
9 Such habitat provides a good foraging area, abounds with abundant terrestrial insects on which  
10 fish feed, and has high value for fish. The proposed planting plan would not recreate the habitat  
11 or have equivalent value to what exists currently. The large trees with large leaves, and  
12 associated complex habitat, are what this shoreline provided 100 years ago, and are what fish  
13 ideally prefer. The roots of the large cottonwood tree hold the shoreline in, and removal of the  
14 tree will destabilize the area. The cottonwood also provides perching habitat for bald eagles.  
15 Native plants, even with many years to grow to maturity, do not replace the “very unique and  
16 highly desired” habitat. The lawn proposed as part of the arborist’s plan could result in increased  
17 pollution resulting from typical household lawn care activity. (Testimony of Reinbold; Frodge;  
18 Buehler)

19 [22]

20 Scott Swarts, a fish and wildlife biologist with David Evans & Associates consulting  
21 firm, testified that he was familiar with the Tyler property. He acknowledged that the reduced

1 setback would have environmental impacts from greater potential erosion and sedimentation. He  
2 also acknowledged that future residents' use of fertilizers on the lawn could increase the runoff  
3 of nutrients into the lake, which can make the lake eutrophic. However, he believed potential  
4 environmental impacts could be reduced to acceptable levels through a variety of measures. He  
5 recommended the use of a silt fence, hay and piles of debris and earth to keep sediments from  
6 seeping into the lake; roofing materials that are non-toxic to the aquatic environment; porous  
7 paving materials in lieu of a patio; a level spreader to disperse roof runoff; and a native  
8 vegetative buffer. However, Mr. Swarts conceded that nothing in the Hearing Examiner's  
9 decision requires conditions to address pollutants. (Testimony of Swarts) Mr. Lux stated at  
10 hearing that as a guarantee he would "pull the permit" if these mitigation measures were not  
11 done. He also stated that he could record the proposed mitigation measures in the title to the  
12 property. (Testimony of Lux)

13 [23]

14 The Board finds that the arborist's report is accurate, but that its scope is limited to  
15 addressing steps to reduce environmental impacts should the residence be constructed as  
16 proposed. It does not address a situation in which the construction does not proceed, or in which  
17 construction is limited to within the existing shoreline setback. We find that removal of the large  
18 cottonwood within the setback, and its replacement with immature vegetation, will have negative  
19 impacts to the shoreline in that it will remove a root system that stabilizes the shoreline, and  
20 disturb or remove habitat that benefits fish and bird populations. The gravel path proposed in the  
21 arborist's report further increases impervious surfaces. While the planting plan would mitigate to

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1 some degree the harm to the habitat if fully implemented and maintained, it would not eliminate  
2 the harm or restore the habitat to its pre-construction condition.

3 [24]

4 The Board also finds that a reduction of the setback from 20 to 14 feet would have other  
5 environmental impacts on the shoreline. The proposed setback variance would reduce the area  
6 available for construction activities, including workers, construction equipment, and fill, and  
7 consequently move such activity nearer the shore. The use of heavy machinery and fill so close  
8 to the lake can impact soil and roots, causing destabilization of the shoreline. (Testimony of  
9 Reinbold) With a reduced setback, the property is more susceptible to flooding. Even though  
10 Lux testified that he would not build a bulkhead on the property, the Board finds compelling  
11 testimony that subsequent owners are likely to respond to flooding by bulkheading, which in turn  
12 displaces water to other properties and causes flooding on them. (Testimony of Schisel, Buehler)  
13 The impacts to the shoreline and lake of activities generally found on full-time residential  
14 properties would be greater where the natural buffer is reduced. These include reduced ability of  
15 the buffer to filter runoff associated with landscaping, increased impervious surfaces, pet feces,  
16 and use of fertilizers, paints, window washing chemicals, and pesticides. Limiting the buffer's  
17 size reduces its ability to filter out nutrients such as phosphorous on which algae feed; increased  
18 algae produces neurotoxins that are harmful to fish and wildlife. (Testimony of Robohm,  
19 Summerhays) A shoreline access path between the house and shoreline to accommodate  
20 common recreational activities such as swimming and boating would further reduce the natural  
21 buffer. (Ex. R-1; Testimony of Schisel, Buehler) Placement of the house closer to the lake also

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1 increases light pollution that attracts predators to out-migrating salmon and decreases their  
2 ability to hide from predators. (Testimony of Frodge, Summerhays) While the mitigation  
3 measures identified by Mr. Swarts – level spreaders, non-toxic roofing material, and porous  
4 paving stones for the patio – may reduce to some degree the adverse environmental impacts of  
5 the project, they would not eliminate them. Because the plans call for a grass lawn and gravel  
6 path in the setback area, there is additional risk to the lake habitat if future residents use  
7 environmentally unfriendly fertilizers or weed control.

8 [25]

9 Lux has not prepared final house plans. While his proposal to the City was to build a  
10 house of 1900 square feet, the architect’s floor plans introduced at hearing show a house with a  
11 first floor area of 896 square feet and a total area of 2,369 square feet. The plans also show a  
12 spiral staircase and deck that extend into the setback but which do not appear to be included in  
13 the plan’s area summary. (Ex. P-4) Mr. Lux testified that he originally intended to build a  
14 house for his own family, and that the floor plans were developed before he was aware a  
15 variance would be required. Mr. Lux explained that these plans were “rough drawings” but that  
16 the finished home would be wholly contained behind the setback. He further stated that  
17 drawings showing a 670-square-foot residence were “not engineered yet.” (Testimony of Lux)



1 [26]

2 The Board finds that the construction of a home within the shoreline setback is both  
3 physically and economically feasible.<sup>5</sup> Mr. Lux testified that although it is possible to build a  
4 house on the lot in accordance with the 20-foot shoreline setback, such a home would not be  
5 “marketable,” and his company would not exercise its option to purchase the property. He  
6 clarified that without a variance his current proposal for a three-story 1900 square-foot home  
7 would be reduced by about 450 square feet. (Testimony of Lux) This Board recently upheld  
8 Ecology’s approval of a variance on Lake Sammamish to allow construction of a 1500 square-  
9 foot home on a considerably larger lot. *Garrett v. Ecology, SHB No. 03-031 (2005)*. While such  
10 a house would surely be less profitable than a larger one, there is no compelling evidence that  
11 such a house, or a lot with a smaller buildable area, is unmarketable.

12 [27]

13 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

14 **Conclusions of Law**

15 [1]

16 The Board has jurisdiction over the parties and the subject matter of the case pursuant to  
17 RCW 90.58.180. The Board reviews the case *de novo*. WAC 461-08-500. Petitioner Lux Homes  
18 has the burden of establishing that the variance denial by Ecology was in error. RCW  
19 90.58.140(7).

20 \_\_\_\_\_  
21 <sup>5</sup> The Board is not determining in this case whether a house within the 20-foot setback complies with the Shorelines  
Management Act, SMA regulations, or the King County Shorelines Master Plan.  
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1 [2]

2 The sole legal issue in this case, as set forth in the pre-hearing order, is whether  
3 “Appellant’s proposal to construct a residence within 14 feet of the shoreline of Lake  
4 Sammamish meet[s] the requirements for a variance permit from the setback provisions in the  
5 City of Sammamish Shoreline Management Plan, the Washington State Shoreline Management  
6 Act, (“Act”), and the applicable state shoreline regulations?”<sup>6</sup> At the outset, the Board concludes  
7 that this case is not governed by the City of Sammamish’s shoreline plan. That plan, while  
8 approved by the City, has not been approved by Ecology as required by the Shoreline  
9 Management Act, RCW 90.58.060, and therefore has no force or effect. Rather, the King  
10 County Shoreline Master Plan that applied to this shoreline area prior to the City’s incorporation  
11 in 1999 continues to apply. KCC 25.04.010, *et seq.* The Board will therefore review the  
12 applicant’s variance request under the criteria in the King County SMP, as well as the Act and  
13 applicable state shoreline regulations.<sup>7</sup>

14 [3]

15 Mr. Tyler’s lot is located within an area designated as “rural environment” under the  
16 King County Code. A rural environment is intended “to restrict intensive development, function  
17 as a buffer between urban areas, and maintain open spaces and opportunities for recreational  
18 uses, within the ecological carrying capacity of the land and water resource.” K.C.C. 25.20.010.

19 \_\_\_\_\_  
20 <sup>6</sup> At hearing, SLS raised the issue of the proposed development’s compliance with the City of Sammamish’s flood  
plain ordinance. However, this issue was not identified prior to hearing and the Board declines to address it here.

21 <sup>7</sup> SLS suggested at hearing that a recent King County critical areas ordinance that amends the County’s SMP and  
may require a greater setback than 20 feet. However, this ordinance has not yet been submitted to Ecology as part of

1 The Code provides, “Single-family residential development may be permitted in the rural  
2 environment subject to the general requirements of K.C.C. 25.20.030 and the residential  
3 provisions of K.C.C. 25.16.090 through 25.16.140 of the urban environment.” Among those  
4 Code provisions, KCC 26.16.100 (C) establishes that “single-family residential development  
5 shall maintain a minimum setback of twenty feet from the ordinary high water mark....”

6 [4]

7 Local government is the lead agency in the statutory process of issuing a Shoreline  
8 Variance consistent with the Shoreline Management Act (SMA), the local shoreline master  
9 program (in this case, King County’s SMP) and other regulations. RCW 90.58.140(1). This  
10 Board has recognized that variances from an approved master program are allowed “only if  
11 extraordinary circumstances are shown and the public interest suffers no substantial detrimental  
12 effect.” *Weston v. San Juan County*, SHB 01-031 (June 12, 2002), citing *Buechel v. Dept. of*  
13 *Ecology*, 125 Wn.2d 196, 203 (1994). For that reason, the Act contemplates and the  
14 implementing rules establish a high threshold for shoreline variances. To be eligible for a  
15 shoreline variance, a party bears the burden of showing that all of the criteria in WAC 173-27-  
16 170 have been met. These variance criteria are:

- 17 (a) That the strict application of the bulk, dimensional or performance standards set forth  
18 in the applicable master program precludes, or significantly interferes with,  
19 reasonable use of the property;  
(b) That the hardship described in (a) of this subsection is specifically related to the  
20 property, and is the result of unique conditions such as irregular lot shape, size, or

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21 its amended shoreline master program. Until Ecology reviews and approves the amendment as required by RCW  
90.58.090, the Board will continue to apply the County’s pre-existing SMP.  
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1 natural features and the application of the master program, and not, for example, from  
2 deed restrictions or the applicant's own actions;  
3 (c) That the design of the project is compatible with other authorized uses within the area  
4 and with uses planned for the area under the comprehensive plan and shoreline master  
5 program and will not cause adverse impacts to the shoreline environment;  
6 (d) That the variance will not constitute a grant of special privilege not enjoyed by the  
7 other properties in the area;  
8 (e) That the variance requested is the minimum necessary to afford relief; and  
9 (f) That the public interest will suffer no substantial detrimental effect.

10 In addition, the Board must consider whether approval of a particular variance proposal will have  
11 potential cumulative impacts, e.g., by triggering an accumulation of similar request for variances  
12 by neighboring landowners.

13 ***Intervenor's Motion to Dismiss***

14 [5]

15 At hearing, Intervenor SLS moved to dismiss the case based on testimony that Lux had  
16 not applied for nor obtained a shoreline substantial development permit ("SSDP"), and SLS and  
17 Lux Homes submitted written briefs on the matter. In its brief, SLS re-characterized its motion  
18 as a motion for remand to the City "for simultaneous processing of a [SSDP] together with the  
19 variance permit now under consideration," arguing that such simultaneous processing is required  
20 by the Shoreline Management Act, the King County Master Program, and Ecology regulations.  
21 Lux, while not does not conceding that an SDP is required, argued that an SDP is not a  
prerequisite for a variance, and that "[i]f it must apply for an SDP prior to or concurrently with  
its building application, it can do so." Brief at 3.

1 [6]

2 We agree that if Lux Homes is the permit applicant, it will need to obtain an SSDP before  
3 developing the property. RCW 90.58.040(3)(e)(iv) and WAC 173.27.040(2) sets forth several  
4 exemptions from the SSDP requirements. The Appellant has not argued that it is exempt from  
5 the SSDP requirements, and the Board does not find any exemptions that would apply based on  
6 the facts in this record. WAC 173.27.040(2)(g) exempts

7 (g) Construction on shorelands by an owner, lessee or contract purchaser of a single-  
8 family residence for their own use or for the use of their family, which residence does  
9 not exceed a height of thirty-five feet above average grade level and which meets all  
10 requirements of the state agency or local government having jurisdiction thereof. ....

11 Because Mr. Lux is not the owner, lessee or contract purchaser, and because he testified that he  
12 did not intend to live in the house, he is not eligible for this exemption.

13 [7]

14 SLS cites to nothing in either statute or regulation that requires variance and SSDP  
15 applications to be made or processed simultaneously. Indeed, Ecology's application  
16 requirements for SSDPs, variances, and conditional use permit do not include simultaneous  
17 submissions of all necessary shoreline approvals. *See* WAC 173-27-180. Further, SSDPs,  
18 variances, and conditional uses may be sought using different forms, and local governments have  
19 discretion to determine these application requirements. WAC 173-27-190. There is no  
20 requirement for simultaneous permit applications in the King County SMP applicable in this  
21 case.

1 [8]

2 SLS argues that where both a variance and an SSDP are required, the Board can  
3 determine based on the facts that the permits should be processed simultaneously. It cites as  
4 authority *Merkel v. Port of Brownsville*, 8 Wa.App. 844, 509 P.2d 390 (1973), which rejected a  
5 port's attempt to "piecemeal" development of a small boat marina into uplands and shorelines  
6 components. In that case, the Court of Appeals upheld an injunction against a port for  
7 development in uplands where a marina project, which spanned both uplands and wetlands, had  
8 received SEPA approval for the upland portion but not approval required by SMA for the  
9 shoreline wetlands. The Court held that in light of "the obvious interrelation of this project upon  
10 the wetlands and adjacent upland areas," the commencement of development of one portion  
11 would have a coercive effect on permitting of the other. *Id.* at 850. "Irreparable damage would  
12 flow from allowing any portion of this project to proceed without full compliance with the  
13 permit requirements of the SMA." *Id.* at 851.

14 But the facts of this case, we believe, do not involve the same kind of "piecemealing."  
15 Here, the appellant is not attempting to *begin* developing one part of a project before it receives  
16 regulatory approval of another. To the contrary, the appellant here has *refrained* from  
17 developing the parcel until all the necessary permits, including the variance, are received. It is  
18 seeking a variance before it undertakes the time and expense of an SDP application for the  
19 simple reason that denial of a variance would moot the need for an SDP. Any "coercive effect"  
20 that the grant of a variance would have on consideration of an SDP application is, in our view,  
21 speculative, and involves a different situation altogether from that where an application has

1 clear-cut timberlands and turned earth on one part of a project while awaiting approval of  
2 another.

3 [9]

4 Lux Homes argues that SLS had waived its right to raise the issue of the SDP “when it  
5 sought to intervene for limited purposes unrelated to the lack of an SPD.” Brief at 3. Because  
6 we hold that the applicant need not file for a shoreline substantial development permit  
7 concurrently with his shoreline variance application, we need not address whether SLS is  
8 estopped from raising the matter before the Board.

9 *Variance Criteria*

10 [10]

11 We now turn to the question of whether Petitioner Lux Homes has met its burden of  
12 showing that the criteria in WAC 173-27-170 have been met.

13  
14 *Reasonable Use*

15 [11]

16 First, under WAC 173-27-170(a), Lux Homes must show that the strict application of the  
17 bulk, dimensional or performance standards set forth in the applicable master program precludes,  
18 or significantly interferes with, reasonable use of the property. Ecology, noting that adjoining  
19 and other substandard lots in the areas are used for recreation, determined that this lot could be  
20 used for recreational purposes without a variance, and therefore the strict application of the

1 shoreline setback did not preclude or significantly interfere with the reasonable use of the  
2 property. (R-1, p. 3)

3 [12]

4 Our inquiry is not simply whether the property can be used for recreation – any property  
5 can be used for recreation – but whether limiting property to such a use is appropriate under the  
6 circumstances. The determination of whether strict application of a shoreline plan precludes or  
7 interferes with “reasonable use” of property is always a fact-specific inquiry that examines a  
8 number of factors. The Board will look at the uses of adjacent and nearby lots, the reasonable  
9 expectations of the owners, and the unique attributes of the lot. *Garrett v. Ecology*, SHB No. 03-  
10 031, 03-032 (May 5, 2005).

11 [13]

12 We have found that a modest residence can be constructed on this small property without  
13 a shoreline variance. Therefore, we conclude on this basis that Mr. Lux is not precluded from  
14 the reasonable use of his property. We also find that because a smaller home can be built  
15 without a variance and that limiting the size of the structure does not preclude reasonable use, the  
16 variance requested is not the minimum necessary to afford relief and Lux Homes fails to meet  
17 the criterion in WAC 173-27-170(e).

18 [14]

19 Moreover, in this case, the property adjoins lots that are undeveloped and used for  
20 recreational purposes. The lot has been used historically for recreation, as evidenced by a tax  
21 document submitted by the owner, Mr. Tyler, when he purchased the lot in 1981. (SLS Exs.11,

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12) The Washington Supreme Court has stated, “[t]o some extent the reasonable use of property depends on the expectations of the landowner at the time of purchase of the property.” *Buechel*, at p. 209. The Tyler property is located in an area that is densely populated and increasingly developed, and which retains significantly less of the “rural environment” now than it did when its shoreline designation was made years ago. We are not prepared to say that outright prohibition of construction is necessary to further the goals of the SMA or to satisfy the no-reasonable-use prong of the variance criteria. However, Mr. Lux was clearly aware of the shoreline setback at the time he entered into his agreement with Mr. Tyler. He testified that he did not want to make a final purchase of the property until he had secured a variance, so it cannot be said that Mr. Lux or Lux Homes has an investment-backed investment in this case. The Board is struck by the small size of this lot, and notes that lots of similar size in the area are, with few exceptions, undeveloped and used for recreational purposes. Moreover, small lots are not a “unique condition” but a common attribute of properties in this area of the Lake Sammamish shoreline. All these factors weigh against concluding that authorizing a development of the size proposed by Lux is necessary to allow a reasonable use of the property.

*Adverse Environmental Impacts*

[15]

In its closing brief, Lux contends that consideration of potential environmental impacts is premature at this stage and can be addressed when Lux applies for a building permit or, if necessary, a shoreline substantial development permit. (Closing Brief at 11) We reject this

1 contention. WAC 173-27-170 (c) clearly states an applicant for a variance bears the burden of  
2 showing that a proposed project “will not cause adverse impacts to the shoreline environment.”  
3 An applicant cannot avoid this burden by seeking to postpone environmental review until such  
4 time that it files a subsequent permit application.

5 [16]

6 The Board concludes that Lux Homes has not met its burden to show that grant of the  
7 variance would not result in adverse impacts to the shoreline environment. While we hold that  
8 the applicant need not file for a shoreline substantial development permit concurrently with his  
9 shoreline variance application, we do nonetheless expect the variance application to provide a  
10 fairly complete and final plan for the proposed project. In this case, the Petitioner has not  
11 submitted final plans for the house itself or the specific steps to be taken to remediate potential  
12 environmental damage. Rather, it has offered a house plans that, by Mr. Lux’s own testimony,  
13 are “rough drawings” that exceed the area that would be allowed by the variance. It did not  
14 provide Ecology with a proposed planting plan, but rather it provided at hearing an arborist’s  
15 report that recommended various options it may or may not utilize for buffering the residence  
16 from the shoreline. Moreover, while Lux’s consultant discussed several steps that could be taken  
17 to reduce shoreline instability and environmental damage, the plans do not specify what steps the  
18 applicant would actually take or provide an enforceable commitment to implement them. As  
19 such, it has not provided sufficient information to meet its burden of showing that the project  
20 would not have adverse impacts to the shoreline environment, that the variance requested is the

1 minimum necessary to afford relief, or that the public interest would suffer not substantial  
2 detrimental effect.

3 [17]

4 Even if we assume the plans submitted were final, conformed to the variance requested  
5 and that all of the mitigation discussed were implemented, the Board has found that while these  
6 would reduce environmental damage to some extent, they would not eliminate adverse  
7 environmental impacts. Counsel for Lux Homes argues that because the environmental impacts  
8 would occur whether the house was built without a variance, there is no additional environmental  
9 impacts due to the grant of the variance. We disagree. First, Mr. Lux testified that he would not  
10 purchase the land or build a house if he is denied a variance. In this case, then, approval of the  
11 variance is likely the act that triggers construction; the adverse environmental impacts would be  
12 less likely to occur without a variance. Second, where the Board has found that removal of the  
13 large cottonwood and associated root system would lead to destabilization of the shoreline,  
14 maintaining the natural buffer between the lake and the proposed structure is even more critical.  
15 Reduction of the buffer by even six feet, or 210 square feet – more than a third – will reduce the  
16 ability of the buffer to filter runoff that adversely impacts fish habitat. It will also reduce the  
17 space available for construction activity, including equipment, and force such activity closer to  
18 the shore where it will potentially disturb the existing soils and increase sedimentation. The  
19 City's requirements for a planting plan to be determined after the fact are vaguely worded, and  
20 do not provide Ecology or the Board a means of assessing either the adequacy of the conditions  
21 the City would impose, the adequacy of implementation, or the adequacy of enforcement. Other

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1 than the planting plan component, the City’s requirements for a “shoreline enhancement /  
2 restoration plan” are limited to removal of debris “placed upon the subject site.” The Petitioner,  
3 then, has fallen short of meeting its burden to justify a variance under WAC 173-27-170(c).  
4 Because Lake Sammamish is a shoreline of statewide significance, WAC 173-20-370(4) and the  
5 adverse environmental impacts would impact salmon habitat along this shoreline, we also  
6 conclude that the grant of variance would violate WAC 173-27-170(2)(f), which requires that the  
7 public interest will suffer no substantial detrimental effect.

8  
9 *Grant of Special Privilege*

10 [18]

11 The Board concludes that several substandard-sized lots exist on the east shore of Lake  
12 Sammamish, including the lots adjoining the Tyler property. Because there are so many small  
13 lots in this area, the small size of a lot by itself could not be deemed a “unique condition” or  
14 “extraordinary circumstance” justifying a shoreline variance of the kind sought by Lux. Indeed,  
15 in *Garrett*, this Board upheld Ecology’s conditioning of a variance to allow that construction of a  
16 home no greater than 1500 square feet, and that was on a lot that is more than twice the size of  
17 the Tyler property. Absent the variance in *Garrett*, the lot was not buildable. In this case, the lot  
18 is buildable even without the variance. Thus, the variance sought by Lux in this case would, we  
19 believe, constitute a grant of special privilege not enjoyed by other properties in the area and  
20 would not meet the criterion in WAC 172-27-170(d).

1 *Cumulative Impacts*

2 [19]

3 The Board must consider whether approval of a particular variance proposal will have  
4 potential cumulative impacts, e.g., by triggering an accumulation of similar request for variances  
5 by neighboring landowners. WAC 173-27-140. In this case, we have determined that the  
6 proposed project will have adverse environmental impacts on the Tyler property and to Lake  
7 Sammamish. The record also shows the Tyler lot is one of four contiguous undeveloped, small  
8 and non-conforming lots, and other such lots exist between the lake and the East Lake  
9 Sammamish Trail. We conclude that if these were properties were granted variances similar to  
10 those requested by Lux Homes for the Tyler property, there would be significant potential  
11 cumulative impacts to the Lake Sammamish environment. We conclude that the variance  
12 request does not meet the criterion in WAC 173-27-170(4).

13  
14 Based on the foregoing analysis, the Board enters the following

15 **ORDER**

16 Save Lake Sammamish's motion to dismiss, and Motion for Remand to the City "for  
17 simultaneous processing of a [SSDP] together with the variance permit now under consideration"  
18 are DENIED.

19 Ecology's denial of Shoreline Variance Permit #2004-NW-80049 (City of Sammamish  
20 Variance Permit #PLN2004-00010) issued by the City of Sammamish to Lux Homes LLC is  
21 AFFIRMED.

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1 SO ORDERED this 1st day of August 2005.

2 **SHORELINES HEARINGS BOARD**

3 David W. Danner, Presiding

4 Bill Clarke, Chair

5 William H. Lynch, Member

6 Judy Wilson, Member

7 Mary-Alyce Burleigh, Member

8 Peter Philley, Member